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IN THE

Supreme Court of the United States

October Term, 1934—Nos. 606 and 607

No. 606

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*

Appellants

v.

THE UNITED STATES OF AMERICA, *et al.*

Appellees

No. 607

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO

Appellant

v.

THE UNITED STATES OF AMERICA, *et al.*

Appellees

REPLY BRIEF IN BEHALF OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT IN NO. 607

CHARLES E. COTTERILL
Solicitor for Appellant The Union Stock Yard and Transit Company of Chicago
70 East 45th Street
New York, N. Y.

IN THE

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, *Appellants*, *v.* THE UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 606
THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, *Appellant*, *v.* THE UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 607

REPLY BRIEF IN BEHALF OF THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO, APPELLANT IN NO. 607

As in the main brief this short reply is divided into two sections. The first concerns the contention of the Government and the Hygrade Company that the Commission's order was properly directed to the Yard Company. The second consists of only a few observations on the position of appellees concerning the validity of the Commission's order as a whole.

I

On the matter of the Yard Company having been made a party respondent to the Commission's order.

Adversary counsel do not question that the Yard Company separately insisted before the Commission that because of fundamental changes of fact it no longer is a "common carrier engaged in the transportation of property by railroad" within the jurisdiction of the Commission and therefore is not subject to any order of that body. They do not question that the Commission failed even to state that such separate issue as to its lack of jurisdiction was raised and pressed throughout the proceeding. They do not point to any findings by the Commission as to what material changes of fact have occurred from the basis on which the Yard Company insisted before the Commission that jurisdiction no longer existed. Under the circumstances there seemingly would be put upon this Court an unwarranted burden were it to be the law that this failure requires that the Court should find the facts and spell out for the Commission some theory by which to hold the yards. (*U. S.* v. *C. M. St. P. & P. Ry. Co.*, decided by this Court, March 4, 1935.)

Only at the end of their brief do counsel for the Government deal with the question whether the Yard Company is properly subject to the Commission's order as to whether the Yard Company is now a "common carrier engaged in the transportation of property by railroad," Government counsel say no more than that "it would seem", that if it were "necessary" again to determine the question judicially, the answer would be in the affirmative, although the suggestion is not reasoned

out. Without saying more than that on this controlling question of jurisdiction, adversary counsel then shift to the proposition that insofar as concerns *unloading* of livestock the Yard Company is an avowed "agent" of the railroad. Upon that premise it is said that Section 16(7) of the Act would put upon the Yard Company a *criminal* responsibility if, in the capacity of such agent, it did anything in connection therewith which would be in *violation* of the Commission's order against the *railroads*. On that account (it is said) the making of this order by the Commission against the Yard Company is "harmless."

The Yard Company is an "agent" only to a limited extent. No claim is made by adversary counsel that the Yard Company is a railroad "agent" in respect to its facilities and activities availed of by the Hygrade Company in the effort to take livestock out of the unloading pens through the Yard properties into its own plant outside. For a concern to be an "agent" for one purpose does not make it an "agent" for all purposes. In that respect the case now before the Court is readily distinguishable from *Adams* v. *Mills*, 286 U. S. 397. In that case the situation before the Court involved only the matter of the "unloading." While decided long afterwards, that case dealt with a period prior to 1921, at a time when the Yard Company was still a common carrier by railroad. This Court rejected a contention that the Yard Company was then immune to the Commission's order there involved merely because, while being a common carrier by railroad, the things which it did were in the capacity of railroad "agent." It was in such sense that this Court there declared the responsibility of the Yard Company to that order of the Commission then under review was not affected by its "status" as a

common carrier. Here the Yard Company is not a common carrier by railroad; and, in any event, this case concerns things and properties *outside the scope of any agency for the railroads.*

Moreover, it is extreme to say that a civil order of the Commission may be directed to the Yard Company, commanding it to "cease and desist" and to be responsible in damages, on some theory that it is "harmless error" to do so because of its criminal responsibility should the Yard Company, *within* the scope of its carrier agency, hereafter do anything by way of violation of the Commission's order as *directed to the railroads.* Such civil order of the Commission is not "harmless" as to the Yard Company whose independence and liberty of action are sought by the order to be restrained.

For the first time reference now is made by the Government to the provisions of Section 8 of the Elkins Act as if they warrant an order against the Yard Company although otherwise it may not be subject to the Commission's jurisdiction. By this reference to Section 2 of the Elkins Act it is made plan that at least Government counsel do not seek to support the Commission's order against the Yard Company as one grounded upon a determination that the Yard Company is subject to the Commission's jurisdiction and is guilty of a violation of law. Rather is it the obvious endeavor of Government counsel to hold the Yard Company subject to the Commission's order only because it may be *collaterally "interested"* in the dispute between the Hygrade Company and the railroads. It is not pointed out wherein such collateral interest is of a kind enabling the Commission to make any "cease and desist" order against the Yard Company and to require it to pay damages on

past transactions. The "interest" of the Yard Company in the railroad "practice" is not demonstrated. The only Yard Company interest springs from the fact that it was made a party defendant before the Commission and now seeks by this proceeding in court to nullify the Commission's order. Beyond that the Yard Company is not "interested." Were the order of the Commission valid against the railroads (which the Yard Company joins in denying) no lawful requirement of the Commission directed to the railroads need or constitutionally could put upon the Yard Company any burden of assisting the railroads to comply with such an order. The Yard Company is not a contributor to or beneficiary of any violation of the law by the railroad companies such as determined by the Commission. The Yard Company could not control the action of the railroads in that regard. The Yard Company *has not been put by the railroads* into position to make the yardage charge against the shippers as in the case of the Covington Stock Yards. The Yard Company is in business only for itself and the Hygrade Company is not compelled by the railroads to use the Yard facilities. No order of the Commission could constitutionally require the Yard Company to permit railroads to use or pay for the Yard facilities in discharge of any obligation the railroads are said to be under in serving shippers and consignees. The Yard Company is not "affected" by the railroad refusal to arrange and pay for use of the Yard facilities by such shippers and consignees. What the Commission's order seeks to require is that the *railroads* shall assume the obligation to arrange that shippers and consignees may have free access to the unloading pens. What that mode of access should consist of is not even in-

dicated. It would not follow that it would consist of the free use of the Yard properties and viaduct into the Hygrade plant for which the Hygrade Company heretofore has been paying the Yard Company its "yardage" charge. If such a Commission order were to be lawful the railroads would be left to their own determinations of what sort of arrangement to make with the Yard Company and on what terms. No lawful order of the Commission may put upon the Yard Company any degree of compulsion that it accommodate itself to whatsoever such necessities of the railroads should prove to be. The Yard Company would be "affected" and be "interested" in the outcome only in the sense that were the Commission's order held valid against the railroads the Yard Company might anticipate that to meet the Commission's order the railroads would *seek* to make some sort of arrangement with the Yard Company by which the railroad responsibility might be discharged. To argue that a collateral or contingent interest of that kind on the part of the Yard Company would, under Section 2 of the Elkins Act, enable the Commission to coerce the Yard Company by order into the surrender of what otherwise would be its complete liberty of action is to argue that it is within the power of Congress to require that a company which is not a common carrier by railroad shall none the less enter into a contract with those who are common carriers by railroad so that the latter might discharge their determined duties to the public. The "liberty of contract" guaranteed by the Constitution of the United States would preclude any such construction of Section 2 of the Elkins Act as would lead to that kind of result. No case cited by Government counsel supports them in their position.

II

On the matter of the invalidity of the Commission order as a whole.

To avoid duplication of the reply of railroad appellants in No. 606, only a few observations are here indulged concerning the arguments of the Government respecting the Commission's order as a whole.

It is a fair characterization of the brief for the Government to say that it consists of an effort to marshal out of the record a mass of facts *not found by the Commission* and to propose various theories on which the Commission *might* have been warranted in finding a violation of law, but which *it did not describe.* Charged with the duty of defending a Commission order based upon a "report" which is so cryptic in style as this one and significantly lacking in clear-cut determinations either of fact or law there was nothing else for Government counsel to do despite the assurance that under its recent decision on March 4th, in *U. S.* v. *C. M. St. P. & P. Ry. Co.*, this Court will properly annul the Commission's order if on no other ground than that it is not charged with the duty of finding out whether the record before the Commission would display a set of facts on the basis of which some unidentified violation of the Interstate Commerce Act could have been found. The concluding language used by Mr. Justice CARDOZO in the case referred to summarizes the whole situation:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

(a) The contention that the Commission found "no services" are performed by the Yard Company on the shipments involved.

Running through the Government's brief is a reiteration that there are none such shown in the record and the Commission found that there are no "services" performed by the Yard Company on inbound shipments subsequent to unloading of the livestock through unloading pens. No such finding of the Commission was made. The Commission's statement was that "no services are performed *for which an extra charge may be imposed.*" That language amounts to no more than an ultimate conclusion of the Commission that an affirmative order in favor of the Hygrade Company was warranted. Any other construction would convict the Commission of gross inaccuracy because the true situation is that the "yardage charge" is imposed in consideration of the desire of the Hygrade Company to use the Yard properties and special facilities, as well as protection, in taking the livestock out of unloading pens through the Yard properties and over a viaduct into the plant of the Hygrade Company outside the Yards. The Yard Company is not a philanthropic institution. It is engaged in business for the purpose of gain. The railroads have not employed it to make available its yard properties and special facilities to shippers and consignees. Railroad employment of the Yard Company is strictly confined to the unloading of the livestock from freight cars and the rendering of certain minor clerical services. It is entitled to profit upon its heavy investment in public stockyard facilities. It is under no obligation to the railroads or to others to

permit the Hygrade Company to use without charge the viaduct leading into its plant outside the Yard or to use the other Yard properties. The Commission did not and under the record could not find that "no services" are rendered for which the yardage charge is *imposed*.

(b) The argument that Section 15(5) should not be construed to "cut down" the previously existing law.

Counsel for appellees seem not to seek vindication of the Commission's order as if supportable by the provisions of Section 15(5). That is so notwithstanding the only possible construction of the Commission's report (despite the difficulties of construing it at all) that in the judgment of the *Commission*, it is Section 15(5) which is at the base of the order. The position of Government counsel is made even more difficult by the circumstance that while they endeavor to support the Commission's order on some theory other than that it determined a violation of Section 15(5) yet nothing is or can be pointed to in the report indicating *what*, if any, *other* provision of the statute was deemed by the Commission to be violated.

To escape the limiting force of Section 15(5), Government counsel argue that its enactment was "remedial." The argument destroys itself. Being "remedial" the object of its enactment must have been to serve some purpose *not* then embraced within the scheme of the statute as it formerly existed. To say that Section 15(5) was remedial but that it added nothing to the law is to suggest that Congress did a vain and useless thing and remedied nothing.

The whole misconception of Government counsel springs from their endeavor to overextend the significance

of this Court's decision in the *Covington Stockyards* case. The position is taken that by its decision in such case this Court determined that whenever railroads transport livestock *to and from public stockyards* their duties respecting unloading and free access are the same as they would be at yards belonging to the railroads. Such was not this Court's decision. On the contrary, in the case referred to this Court was dealing with an instance in which complaint was made that a railroad *refused* to provide *any* place for the free discharge and delivery of livestock in a given community and sought, by an exclusive contract with a public stockyards, to *compel* shippers to use such public yards and pay extra charges therefor. Giving to the parties before it an alternative this Court merely declared and applied the obvious rule that under the circumstances the railroad should make free deliveries *somewhere else* or arrange with the public yards to do so at that place.

Consequently when Congress enacted Section 15(5) it created a new rule of law applicable to railroad deliveries of livestock at *all public stockyards*. It went so far as to declare that when railroads engaged themselves to transport livestock to *any* public stockyard, they shall be under the obligation to unload into suitable pens within the yards where the shippers may come for their freight and take delivery if they have arranged with the Yard Company for the privilege of doing so. This was an *extension* of the law as it previously existed. For Government counsel to argue now that such special statute need not have been passed and that since 1887 it would have been permissible for the Commission to reach the same result under its authority to prescribe "reasonable practices" is a position not sustained by the decision in the

Covington Stockyard case and is an effort to defend the Commission's order on some ground which even the Commission itself did not declare.

Other important aspects of the contentions of adversary counsel, to avoid duplication, will be dealt with only in the reply brief of railroad appellants in No. 606.

It may well be that there has been too much elaboration of argument on behalf of the Union Stock Yard and Transit Company of Chicago. As to that defendant the gist of the case may, it is submitted, concisely be stated.

A

The Union Stock Yard is a public utility, performing a service for which there is economic need, under governmental regulation designed fully to protect all users. The owner of the Yard is entitled to receive compensation from those who use it. The Hygrade Company elected to use the Yard and used it in having livestock consigned to the Yard and in taking delivery there.

B

Respecting transportation and delivery, consignees must look to the rail carriers for all services covered by the rates which shippers pay. Whether the duty of the carriers, either under the General Law or under Section 15(5), ends with the delivery of livestock to the Stock Yard Company in its unloading pens, for account of consignees; or whether the duty of the carrier is to deliver to consignees at unloading pens,

where access, ingress and egress is provided by the rail carriers under their published transportation rates, the entire duty rests upon the rail carriers and consignees may look only to the rail carriers for performance of that duty, or for damages because of default. The defendant, Union Stock Yard Company, has done no wrong and cannot be held responsible where it has not been at fault. The order of the Interstate Commerce Commission, requiring that the Yard Company shall render services without compensation, or suffer its properties to remain idle and unused, would work a confiscation or destruction of the Yard property. If there has been a failure of duty owed to the Hygrade Company, by the rail carriers, and if the Hygrade Company has been damaged by the withholding of anything that was due, and which as a result the Hygrade Company was compelled to provide or procure, full justice to the Hygrade Company can and may be done appropriately by an order running only against the rail carriers.

Respectfully submitted,

THE UNION STOCK YARD AND TRANSIT COMPANY OF CHICAGO,

By CHARLES E. COTTERILL,
Its Solicitor.

70 East 45th Street,
New York, N. Y.